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Supreme Court of the United States

OCTOBER TERM, 1943

No. [REDACTED] 37

TOM TUNSTALL

Petitioner,

v.

BROTHERHOOD OF LOCOMOTIVE FIRE-
MEN AND ENGINEMEN, OCEAN LODGE
NO. 76, PORT NORFOLK LODGE NO. 775,
W. M. MUNDEN AND NORFOLK SOUTHERN
RAILWAY COMPANY

BRIEF FOR RESPONDENTS BROTHERHOOD OF LOCO-
MOTIVE FIREMEN AND ENGINEMEN, OCEAN LODGE
NO. 76, PORT NORFOLK LODGE NO. 775 and W. M.
MUNDEN, IN OPPOSITION TO PETITION FOR WRIT
OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FOURTH CIRCUIT.

✓ HAROLD C. HEISS and
✓ RUSSELL B. DAY,

714 Keith Building, Cleveland, Ohio

✓ WM. G. MAUPIN,

445 Bank of Commerce Building, Norfolk, Va.

Counsel for Respondents.

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Supreme Court of the United States

OCTOBER TERM, 1943

No. 779

BRIEF FOR RESPONDENTS BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, OCEAN LODGE NO. 76, PORT NORFOLK LODGE NO. 775 and W. M. MUNDEN, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

STATEMENT

Petitioner, a negro fireman employed by the Norfolk Southern Railway Company, brought this action in the District Court of the United States for the Eastern District of Virginia on behalf of himself and other negro firemen employed by that Railroad against the Railway Company, the Brotherhood of Locomotive

Firemen and Enginemen; two subordinate lodges of that Railway Labor Union, and an officer of one of the local lodges.

The gravamen of the complaint is that the plaintiff as a fireman employed by the respondent railway company had acquired certain contractual rights in the nature of seniority rights; that the Brotherhood as the bargaining agent of the whole craft of firemen had negotiated a certain agreement with the railway which modified the seniority rights in a manner that discriminated against plaintiff; and that thereby plaintiff suffered detriment with respect to seniority rights, sometimes referred to as assignments. The complaint asks for a declaratory judgment that the Union, as bargaining representative, is bound to represent fairly and impartially all members of the craft; an injunction restraining the defendants from enforcing or operating under the agreement complained of insofar as it discriminates against negro firemen, and restraining the Union from acting as the bargaining representative of the negro firemen so long as it refuses to represent them fairly and impartially; an award against the Union for damages; and an order restoring plaintiff to the assignment to which he claims he is entitled and of which he claims he was deprived.

The complaint contains no allegation of diversity of citizenship. It asserts jurisdiction under 48 Stat. 1185; U. S. C. Title 45, Chapter 8; U. S. C. Title 28, Section 41 (8); U. S. C. Title 28, Section 400; and the Federal Rules of Civil Procedure. Federal jurisdiction depends on whether the controversy is one arising under the laws of the United States.

The District Court decided that no federal question was presented and no jurisdiction inhered in that court to hear and decide the case. Accordingly, on May 7, 1943, it granted motions to dismiss filed by respondents, and entered judgment for the defendants and against the plaintiff.

From this judgment plaintiff appealed to the Circuit Court of Appeals for the Fourth Circuit, which, by its opinion entered January 10, 1944 (140 F. (2d) 35) affirmed the order of the District Court. To that judgment of affirmance the writ of certiorari is sought; and in the petition the Railway Labor Act is relied on as affording federal jurisdiction.

QUESTIONS PRESENTED

1. Can any court take jurisdiction of a controversy and proceed to adjudicate it when the record shows affirmatively that a necessary defendant has not been served with process and is not before the court?

2. Does a complaint which alleges that a bargaining agent, chosen pursuant to the provisions of the Railway Act, has negotiated a contract that discriminates against the rights of certain members of the craft established by prior collective bargaining agreements between the representative and the carrier, present a federal question?

SUMMARY OF ARGUMENT

1. Respondent, Brotherhood of Locomotive Firemen and Enginemen, was never served with process in this case. It made timely motion to dismiss the case as to it, appearing specially for that purpose; and there is no jurisdiction of the person as concerns that respondent. The same is true as to respondent Ocean Lodge No. 76.

2. Jurisdiction of the subject matter is lacking since no federal question is presented, because:

- a. The complaint seeks to inject a federal question by attempting to anticipate a probable defense;
- b. The rights claimed by petitioner are plainly non-existent.

ARGUMENT.

— I —

RESPONDENT, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, WAS NEVER SERVED WITH PROCESS IN THIS CASE. IT MADE TIMELY MOTION TO DISMISS THE CASE AS TO IT, APPEARING SPECIALLY FOR THAT PURPOSE: AND THERE IS NO JURISDICTION OF THE PERSON AS CONCERNS THAT RESPONDENT. THE SAME IS TRUE AS TO RESPONDENT, OCEAN LODGE No. 76.

The return of the Marshal of service of the summons and complaint as to respondent Brotherhood of Locomotive Firemen and Enginemen is this: "Returned not executed as to the Brotherhood of Locomotive Firemen and Enginemen, no representative in this district." (R. 53)

By timely motion under Rule 12(b) of the Rules of Civil Procedure, the respondent Brotherhood of Locomotive Firemen and Enginemen, appearing specially, moved to dismiss the action on the ground that there had been no service of process on it; that it is a voluntary unincorporated association (cf. complaint, R. 2), and that no officer or trustee had been served with process; and that the court lacked jurisdiction of its person because there had been no service of process and this respondent was not before the court. (R. 25)

Notwithstanding the return showing that no service on the respondent Brotherhood had ever been made, the District Court held that it had been duly served and was properly before the court; and it overruled its motion to dismiss on the ground that no service of process had been had (R. 50). In the same judgment the District Court dismissed the complaint on the ground of lack of jurisdiction of the subject matter.

The action of the District Court in refusing to dismiss the complaint as to the respondent Brotherhood for lack of jurisdiction of its person was made the subject of complaint in the brief filed by that respondent with the Fourth Circuit. The point was not notified in the opinion of the Circuit Court of Appeals for the Fourth Circuit.

It seems superfluous to argue that the Brotherhood, as to which the Marshal's return shows no service of process, is not before the court unless service on its subordinate lodges be held to be service upon it.

Rule 17(b) of the *Rules of Civil Procedure* provides that capacity to sue or be sued shall be determined by the law of the state in which the District Court is held.

Section 6058 of the *Code of Virginia of 1936* reads as follows:

"All unincorporated associations or orders may sue and be sued under the name by which they are commonly known and called, or under which they do business, and judgments and executions against any such association or order shall bind its real and personal property in like manner as if it were incorporated. Process against such association or order may be served

on any officer or trustee of such association or order."

Rule 4 (d) (3) of the Rules of Civil Procedure provides that service shall be made upon an "unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process * * *"

This record shows no service on any officer, trustee, managing or general agent or any other agent authorized by appointment to receive service of process. No agent is authorized by law to receive such service (Code of Virginia, §6058, supra). Service upon an officer of a subordinate lodge is insufficient and constitutes no service at all against the association. *International Brotherhood of Boilermakers v. Wood*, 162 Va. 517.

It further affirmatively appears from the record that respondent Ocean Lodge No. 76 has never been served with process and is not before the Court. The return of the Marshal as to this respondent is as follows:

"Not finding any representative of the within named Lodge (Ocean Lodge No. 76) I served a copy of the Summons together with a copy of the Complaint, by delivering same to Lucile Munden, she being the wife of W. M. Munden, and above the age of sixteen years and a member of his family at his regular place of abode at 1123 Hawthorne Avenue, South Norfolk, Va. for delivery to the within named W. M. Munden at his regular place of abode, a place within my District.

"R. L. Ailworth, United States Marshal,
by H. L. Trimyer, Deputy U. S. Marshal."
(R 54)

By timely motion respondent Ocean Lodge No. 76 appeared specially and moved to dismiss the action so far as concerned it, and to quash the purported service of summons on the ground that no proper service had been made on said Ocean Lodge No. 76, and the Court lacked jurisdiction over the person of that defendant. (R. 32) The District Court in its final judgment held that Ocean Lodge No. 76 had been duly served and was properly before the Court (R. 50). Complaint upon this ruling was made in the brief filed by this respondent with the Court of Appeals for the Fourth Circuit. The point was not noticed in its opinion.

The Marshal's return does not state whether W. M. Munden or Lucile Munden are in any way connected with, officers or trustees or agents of said Ocean Lodge No. 76. Even if it be assumed that W. M. Munden is an officer of said Ocean Lodge No. 76, service upon his wife is no service upon the Lodge. *Section 6041, Virginia Code of 1936* provides, so far as pertinent here, as follows:

"A notice, no particular mode of serving which is prescribed, may be served by delivering a copy thereof in writing to the party in person, or if he or she be not found at his or her usual place of abode, by delivering such copy and giving information of its purport to any person found there, who is a member of his or her family (not a temporary sojourner, or guest) and above the age of sixteen years; or if neither he nor she, nor any such person be found there,

by leaving such copy posted at the front door of said place of abode."

Section 6062 of the Code of Virginia of 1936 provides, so far as pertinent here, as follows:

"Any summons or seire facias may be served in the same manner and by the same person as is prescribed for the service of a notice under Section Six Thousand and Forty-one, except that when such process is against a corporation the mode of service shall be as prescribed by the two following Sections".

The two "following sections" just above referred to are Sections 6063 providing for service of process on domestic corporations, and 6064 providing for service on foreign corporations. Neither provides for service on unincorporated associations which is covered only by Section 6058 hereinabove quoted. An unincorporated association in Virginia can be sued and served only by virtue of that section. *International Brotherhood of Boilermakers v. Wood*, supra. In Virginia, service against a domestic corporation can not be made by serving the wife of an officer, director or agent of a corporation. *Waterfront Coal Co. v. Smithfield Transportation Co.*, 114 Va. 482; *Burks Pleading & Practice* (3d Ed.) 74.

It is clear that Ocean Lodge No. 76 has never been served with process; and, by reason of its special appearance and its motion to quash the service and dismiss the action, it is not before the Court.

The basis of petitioner's complaint arises out of a contract which, petitioner claims, invades his rights.

Only one of the contracting parties—the Railroad—is before the Court.

This point can properly be brought to the attention of the Court without the assignment of cross error or the entry of a cross appeal. The general principle is stated in *Moore's Federal Practice*, §3, 3394; 3577: "But the appellee may, even though he has not entered a cross appeal, defend a judgment on any ground consistent with the record, even if rejected below."

Supporting this principle are the following cases: *Langues v. Green*, 282 U. S. 531, 535; *Commissioner v. Havemeyer*, 296, U. S. 506, 509; *United States v. Curtiss-Wright Co.*, 299 U. S. 304, 330; *Morley Co. v. Maryland Cas. Co.*, 300 U. S. 185, 191.

Since this point is jurisdictional and goes to the right of any court, trial or appellate, to take cognizance of this action as regards respondents Brotherhood of Locomotive Firemen and Enginemen and Ocean Lodge No. 76, it may be raised at any time or in any manner, and, indeed, could be considered by the court *ex mero motu*.

— II —

JURISDICTION OF THE SUBJECT MATTER IS LACKING SINCE NO FEDERAL QUESTION IS PRESENTED.

— A —

The complaint seeks to inject a federal question by attempting to anticipate a probable defense.

The rights which plaintiff seeks to protect are contract rights. The plaintiff complains that these rights were violated by the Brotherhood when it, acting

in the capacity of statutory representative, negotiated an agreement with the railway which violated these contract rights. It is charged that the Brotherhood, in negotiating the new agreement, acted unfairly toward plaintiff and discriminated against him, instead of representing him fairly as it is claimed it ought to do when acting as a statutory representative. The obligation of the contract is a creation not federal, but of the state; and a wrongful breach thereof does not confer federal jurisdiction. *Gully v. First National Bank*, 299 U. S. 109. See also *Teague v. Brotherhood of Locomotive Firemen & Enginemen*, C. C. A. Sixth, 127 F. 2d, 53; *Barnhart v. Western Maryland Ry. Co.*, C. C. A. Fourth, 128 F. 2d, 709; *Burke v. Union Pacific Ry. Co.*, C. C. A. Tenth, 129 Fed. 2d, 844.

In the effort to escape from the effect of the doctrine announced in the *Gully* case, the complaint contains much matter referring to the Railway Labor Act as the origin of the alleged status of the respondent Brotherhood as bargaining agent. So far as the complaint is concerned, these allegations add nothing to it. If, as alleged, the Brotherhood, as bargaining agent, entered into a discriminatory contract to the detriment of the plaintiff and wrongfully deprived him of certain rights, it is immaterial how it became such bargaining agent. These allegations are a patent effort to anticipate a possible defense. Such allegations do not present a federal question, which must be shown by the plaintiff's own statement of his cause of action exclusive of allegations anticipating a defense which may present a federal question. *Gold Washing & Water Co. v. Keys*, 96 U. S. 199; *Chicago, Rock Island Pac. Ry. Co. v. Martin*,

178 U. S. 245; *Louisville & Nashville R. R. Co. v. Mottley*, 211 U. S. 149; *Tennessee v. Union & Planters Bank*, 152 U. S. 454.

The rights which petitioner claims he had and further claims were infringed, be they called seniority rights or assignments, arise solely out of the contractual relationship with the employer. *Hartley v. Brotherhood of Railway & Steamship Clerks*, 283 Mich. 201; *Order of Railway Conductors v. Shag*, 189 Okla. 665; *Ryan v. The New York Central R. Co.*, 267 Mich. 202; *Norfolk & Western R. Co. v. Harris*, 260 Ky. 132.

Therefore, the complaint is that petitioner's contract rights have been violated and the relief sought is based upon such alleged violation. Succinctly, the complaint is breach of contract; and the remedy for such a wrong is a common law remedy to be pursued, if at all, as a matter of local law in the state courts.

The brief of petitioner (p. 14, p. 17) asserts that the decisions below violate the Fifth Amendment of the Constitution of the United States. Again, this is an attempt to set up a federal question by anticipating a possible defense. A suggestion by a plaintiff that defendant will or may set up a claim under the Constitution of the United States does not make the suit one arising under the Constitution. *Tennessee v. Union & Planters Bank*, 152 U. S. 454. *A fortiori* a suit does not arise under the Constitution of the United States, by including in the complaint an anticipated reply to an anticipated defense.

The rights claimed by petitioner are plainly non-existent.

No federal question is presented by a complaint which sets up an alleged federal question plainly unsubstantial, either because it is obviously without merit or because it has been so definitely resolved and settled by previous decisions of this Court that no room is left for reasonable doubt or controversy thereupon. *Levering & Garrigues Co. v. Morrin*, 289 U. S. 103.

The brief of petitioner admits that the Railway Labor Act is silent respecting any provision with regard to the character of the representation of a craft by the duly selected bargaining agent. (Br. p. 9) Whether it be conceded or not, it is a fact, as inspection of the Act will disclose. The District Court so held in its opinion. (R. 46) The Circuit Court of Appeals for the Fourth Circuit stated that fair representation for the purposes of collective bargaining was "implicit" in the provisions of the Railway Labor Act—which is to say that all persons who act as agents or in any other contractual capacity are held to the duty to act fairly and honestly whether specifically directed so to do or not. But the Circuit Court of Appeals for the Fourth Circuit found no provision of the Act which protects or even refers to the rights of the petitioner which, the complaint avers, have been violated. The Circuit Court of Appeals for the Sixth Circuit, in *Teague v. Brotherhood of Locomotive Firemen and Enginemen*, 127 F. (2d) 53, found specifically that the act contained no such provision.

It follows that the petitioner is not seeking judicial construction of the Act, but invoking judicial legislation to the effect that provisions not made by Congress may be inserted therein by the courts. This Court has repeatedly refused to assume any such function. *Ebert v. Poston*, 266 U.S. 548; *United States v. Missouri Pacific R. R. Co.*, 278 U.S. 269.

The identical case here presented has been decided to the same effect by two Circuit Courts of Appeals: By the Sixth Circuit in 1942 in the case of *Teague v. Brotherhood of Locomotive Firemen and Enginemen*, supra, which is indistinguishable from this case, and by the Fourth Circuit here.

It is beyond dispute that the Railway Labor Act contains no provision conferring jurisdiction on the Federal courts to afford the relief which is here sought. That relief is accurately and succinctly summed up in the opinion of the Fourth Circuit in these words (R. 59):

"The court here is asked * * * to declare the duty of a representative admittedly chosen by a majority of the craft, and to interfere by injunction with the process of bargaining undertaken pursuant to the Act on the ground that the purposes of the Act are being violated."

This Court has very recently rendered a line of decisions which seem to be conclusive against federal jurisdiction in this case. They are: *Brotherhood of Ry. & Steamship Clerks, etc. v. United Transport Service Employees of America* (Dec. 6, 1943) U.S. 64 S. Ct. 260; *Switchmen's Union of North America, etc. v. National Mediation Board, et al* (Nov. 22, 1943),

U. S. , 64 S. Ct. 95; *General Committee, etc. v. Southern Pacific Co.* (Nov. 22, 1943), U. S. , 64 S. Ct. 142; *General Committee, etc. v. Missouri-Kansas-Texas R. R. Co., et al.* (Nov. 22, 1943), U. S. , 64 S. Ct. 146.

All of these cases are cited in the opinion of the Circuit Court of Appeals for the Fourth Circuit. (R. 56 et seq.) They hold that relief cannot be afforded in the federal courts under the Railway Labor Act unless the command of the Act be explicit and the purpose to afford a judicial remedy plain. Absent express provisions conferring jurisdiction upon the courts, no jurisdiction exists.

This Court held in *General Committee, etc. v. Southern Pacific Co.*, supra, that there is no jurisdiction in the federal courts to decide which of two conflicting groups, both claiming to be bargaining agent for a craft, was the proper representative under the Act. The effect of this decision is that jurisdiction is denied the federal courts to decide whether a group, claiming to be the selected bargaining agent for a craft, is authorized to represent that craft at all. This being true, it is bound to follow that jurisdiction is lacking in the federal courts to decide whether a group, alleged to be a bargaining agent, has or has not properly and impartially dealt with sundry of the members of the craft which it represents.

In *General Committee, etc. v. Missouri-Kansas-Texas R. R. Co.*, supra, this Court dwelt upon the purpose of Congress to utilize the machinery of conciliation, arbitration and mediation to the greatest extent possible, and its hesitancy to commit delicate problems

highly charged with emotion to the decision of the courts. It stated that "The conclusion is irresistible that Congress carved out of the field of conciliation, mediation and arbitration only the select list of problems which it was ready to place in the adjudicatory channel. All else is left to those voluntary processes whose use Congress had long encouraged to protect these arteries of Interstate Commerce from industrial strife."

It would seem manifest that the vesting of jurisdiction in the federal courts to decide such a case as is here presented would nullify the whole rationale of the opinion in the *Missouri-Kansas-Texas* case. Every agreement made by a bargaining agent with a railroad would be the subject of judicial scrutiny at the behest of any disgruntled member of the craft who might allege that the contract made by that bargaining agent on behalf of the craft with the railroad operated to his disadvantage. All stability of status between the railroad and its employees would be lost. The very purpose of the Act, peaceable settlement of labor controversies and the avoidance of interference by the courts, would be set at naught.

Every railroad must treat with the bargaining agent selected and with no other. *Virginian R. Co. v. System Federation*, 300 U. S. 515. In that case this Court said:

"More is involved than the settlement of a private controversy without appreciable consequences to the public. The peaceable settlement of labor controversies, especially where they may seriously impair the ability of an inter-

state rail carrier to perform its service to the public, is a matter of public concern."

Contracts so made, pursuant to the Railway-Labor Act and in obedience to the mandate of this Court, ought not to be subject to revision by the courts upon the demand of a member of the craft who considers himself aggrieved by the terms thereof. It clearly was not the intention of the Congress to provide that contracts should be made by railroads with a designated agency selected by the employees and then permit such contracts to be abrogated, amended, or enlarged by the courts. That way chaos lies. Were such demands to be judicially entertained and decided, other individuals or groups within the craft might well claim that the decision adversely affected them and ask for further modification of the contract collectively made by the bargaining agent with the railroad. Stable contractual status would be non-existent; far from being promoted, industrial peace would be rendered well nigh impossible.

It seems evident that this Court had cognate considerations in mind when it rendered the recent decisions exemplified by the *Missouri-Kansas-Texas* case.

CONCLUSION

Upon the record here presented these respondents say:

1. That the respondent Brotherhood of Locomotive Firemen and Engineers is a necessary party to this litigation, has never been served with process, is not before the court, and that no order or decision

can properly be made by any court in this case which affects it; and Ocean Lodge No. 76 has never been served with process and is not before the Court.

2. That the federal courts lack jurisdiction of the subject matter of this suit.

3. That the writ of certiorari prayed for in the petition should accordingly be denied.

Respectfully submitted,

HAROLD C. HEISS and
RUSSELL B. DAY,

214 Keith Building, Cleveland, Ohio.

WM. G. MAPPIN,

415 Bank of Commerce Building, Norfolk, Va.

*Counsel for Respondents, Brotherhood of
Locomotive Firemen and Enginemen,
Ocean Lodge No. 76, Port Norfolk Lodge
No. 775 and W. M. Munden.*